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No. 84-438

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION, WALPOLE,
Petitioner,

v.

GERALD HILL AND JOSEPH CRAWFORD,
Respondents.

On Writ Of Certiorari To The Supreme Judicial Court Of Massachusetts

BRIEF OF RESPONDENTS

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11 Massachusetts Lawyers Weekly 353 (December 13, 1982) 11

STATEMENT OF FACTS

On May 2, 1982, Respondents Hill and Crawford, inmates at M.C.I., Walpole, each received a prison disciplinary report. They were each charged with "fighting," "threatening language or [g]esture" and "aiding another person to commit an [offense]."

At the separate disciplinary hearings held for Hill and Crawford on May 11, 1982, the disciplinary board had before it the reporting officer's written report of the incident and his oral testimony. Taken together, this evidence revealed that the reporting officer heard a "commotion," went outside to check on what was going on, found inmate Peter Stephens bleeding from his mouth and suffering from a swollen eye in an area where dirt was "strewn." J.A. 17a, 18a, 19a, 20a, 25a, 26a, 27a. The reporting officer did not see an assault. J.A. 19a. (He was later told by a "medic" that Stephens had been beaten. J.A. 19a.) The reporting officer saw the three inmates in the area jogging away. According to the reporting officer, Hill and Crawford were each among the three inmates. J.A. 17a, 18a, 19a, 20a, 25a, 26a, 27a.

During Hill's hearing the board also received Hill's plea of not guilty and his testimony that "he knows nothing about it" as well as an affidavit prepared by Stephens stating that "Gerald Hill had nothing to do with my present injuries." J.A. 19a, 21a.

During Crawford's hearing, the board also heard Crawford's plea of not guilty and his statement that "he does not know what happened, Stevens (sic) wrote an affidavit stating his innocence. His body was checked for signs of a scuffle, nothing was found." J.A. 27a.

After hearing the evidence in each case, the disciplinary board recommended that Hill and Crawford each lose

100 days good time and be confined in isolation for 15 days. J.A. 19a, 27a.

Both Hill and Crawford appealed the board's action to the superintendent of the prison, unsuccessfully J.A. 23a, 30a.

SUMMARY OF THE ARGUMENT

I. The Massachusetts Supreme Judicial Court held that prison inmates have the constitutional right not to be deprived of good time credits by a prison disciplinary board finding that is not based upon sufficient evidence. The vehicle for the judicial review of this particular administrative decision was Mass. Gen. Laws c. 249, § 4, which permits such review by an action in the nature of certiorari. The issue of an independent right to constitutional review is, therefore, not before this court.

II. Under the due process clause of the Fourteenth Amendment there is a right not to be deprived of a liberty interest by an arbitrary or capricious administrative action. In the context of a prison disciplinary hearing this means that there must be some evidence to support a guilty finding that results in the loss of good time credits. This entitlement logically follows from this Court's opinion in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974) which sets up the mechanism for such review and which guarantees protection from arbitrary actions by prison disciplinary boards.

Such a review for some evidence is also appropriate in light of the serious liberty interest involved in a loss of good time credits which can result in substantially extended incarceration. The burden such review places on the state is relatively minor in view of the current requirements under *Wolff* and the Department of Correction's own regulations. Nor would the legitimate correc-

tional goal of swift and sure discipline be undercut. Good time deprivations do not affect swift discipline. The protection of good time credits from arbitrary action enhances their ability to encourage good conduct.

The Supreme Judicial Court did not choose to rule on whether the standard for legally sufficient evidence should be "substantial evidence" or the more lenient "some evidence" test. The Court below concluded that the Board's findings failed to meet even the "some evidence" test. This is, therefore, an inappropriate case for this Court to use to resolve conflicts among other courts as to the appropriate standard. Nor did the Supreme Judicial Court use a more stringent standard than the "some evidence" rule as the words "legal sufficiency" only describe the reason for review—to find the legal sufficiency of the evidence—not the standard to be used in determining that sufficiency.

III. The Supreme Judicial Court was correct in finding that there was insufficient evidence to support a finding of guilt and a deprivation of good time credits. Evidence that three people were seen leaving a place where an assault may have occurred and the statements by two of those people that they did not know what had occurred is insufficient to find that all three persons were involved in the supposed fight.

IV. Although the issue is not raised in the instant case, the United States Constitution does guarantee a right to judicial review of administrative decisions which deprive a person of a liberty interest, as this Court has previously held.

ARGUMENT

I. IN *HILL* v. *SUPERINTENDENT, M.C.I. WALPOLE*, THE MASSACHUSETTS SUPREME COURT ADDRESSED A PRISON INMATE'S RIGHT TO A DISCIPLINARY FINDING BASED UPON SUFFICIENT EVIDENCE BUT DID NOT RULE ON THE EXISTENCE OF A CONSTITUTIONAL RIGHT TO JUDICIAL REVIEW.

Under Massachusetts law, most inmates held in prison earn good time credits during their imprisonment. These credits range from two and one-half to twelve and one-half days for each month served, depending upon the length of the prisoner's sentence. M.G.L. c. 127, § 129. As they are earned, these credits reduce the length of the inmate's maximum sentence so that each day of "good time" reduces by one day the maximum period the inmate may be held. Good time credit earned by an inmate creates a liberty interest of which he may not be deprived without due process of law. *Nelson* v. *Commissioner of Correction*, 390 Mass. 379, 389 (1983).

The loss of good time credit previously earned is one of the punishments which an inmate may suffer if he is found by a prison disciplinary board to have violated a prison rule. There is no limit to the amount of earned good time which may be taken from a prisoner for a disciplinary infraction. 103 Code of Mass.Reg. 430.23.

In *Hill* v. *Superintendent, M.C.I., Walpole*, 392 Mass. 198 (1984), the Massachusetts Supreme Judicial Court held that an inmate may bring a civil action in the Superior Court challenging the forfeiture of good time credits on the ground that there was not sufficient evidence to support the disciplinary board's finding of guilt. The standard of review approved and used by both the trial court and the Supreme Judicial Court is whether there

was some evidence which could support the disciplinary board's finding. Cert. Pet. App. A 16-17; Cert. Pet. App. B 3.

As noted by the Solicitor General in his *amicus curiae* brief filed in this case, although the Supreme Judicial Court at some points phrased its decision in terms of a constitutional right to "judicial review" of the decision of a prison disciplinary board, that issue was not actually decided by the Court. In fact, the Court allowed review of the administrative decision revoking the respondent's good time by means of an action brought under Mass. Gen. Laws C. 249, § 4, a statute which specifically allows a petitioner "to contend at the hearing upon the petition that the evidence which formed the basis of the action complained of . . . was as a matter of law insufficient to warrant such action." This method of review had previously been approved in *Cepulonis* v. *Commissioner of Correction*, 15 Mass. App. Ct. 292 (1983). "The only portion of the decision below which actually rests upon the United States Constitution is that a reviewing court may examine the merits of the board's determination because due process requires that some minimum amount of evidence support a decision to revoke good time credits." Solicitor General's Br. 7.

Nevertheless, the Petitioner attempts to argue that the Supreme Judicial Court has raised an independent constitutional right of judicial review. Pet's Br. 7. In doing so, the Petitioner has confused the constitutional right at stake, not to be deprived of good time credits without sufficient evidence, with the vehicle by which an inmate takes this issue to court. As stated above, in *Hill* that vehicle was a petition under Mass. Gen. Laws c. 249, § 4.

Because the Petitioner misapprehends the import of *Hill*, he mistakenly takes the Supreme Judicial Court to task for relying upon *Smith* v. *Rabalais*, 659 F.2d 539 (5th Cir. 1981), *cert. den.* 455 U.S. 992 (1982) and *Wilwording* v. *Swenson*, 502 F.2d 844 (8th Cir. 1974), *cert. den.*, 402 U.S. 912 (1975). Pet's Br. 9-10. In neither case is the question of an "independent" constitutional review raised. However, both cases do stand for the proposition that the deprivation of good time credits in a disciplinary hearing without sufficient evidence creates a claim for deprivation of a constitutional right. This, of course, is the very holding of the Supreme Judicial Court in *Hill*.

The Petitioner also incorrectly describes *Smith* and *Wilwording* as cases arising under 42 U.S.C. § 1983. *Smith* was brought under both § 1983 and as a *habeas corpus* action. *Wilwording* was treated solely as petition for a writ of *habeas corpus* and, in fact, relies on this Court's ruling in *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973) which held that a writ of *habeas corpus*, not an action under § 1983, is the correct method of challenging a loss of good time credits.

As noted, this Court does not today face the question of whether there is a constitutional right to judicial review of an administrative decision which deprives a person of his or her liberty. However, in light of the Petitioner's suggestion that no such right exists, Pet's Br. 5-9, the Respondents feel that it is appropriate to briefly examine the Court's prior treatment of this question and have done so below in Section IV of this brief.

II. A PRISON INMATE HAS A RIGHT UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT NOT TO BE DEPRIVED OF EARNED GOOD TIME FOR COMMITTING A DISCIPLINARY OFFENSE UNLESS THERE IS SOME EVIDENCE THAT HE COMMITTED THE OFFENSE.

A. An Arbitrary Or Capricious Deprivation Of A Liberty Interest Violates The Constitution.

All parties to this case agree that there is a constitutionally cognizable claim if there has been an arbitrary or capricious denial of a liberty interest. Pet's Br. 10, 19; see also Solicitor General's Br. 13. All the Supreme Judicial Court has done by requiring that there be some evidence to support a disciplinary board's finding has been to recognize that right. Certainly a finding which is not supported by some evidence is arbitrary and capricious. The majority of the courts that have reviewed prison disciplinary actions for some supporting evidence have framed their analysis in terms of arbitrariness. *Hanrahan* v. *Lane*, 747 F.2d 1137, 1140 (7th Cir. 1984); *Smith* v. *Rabalais*, 659 F.2d 539, 545, n.18 (5th Cir. 1981), *cert. denied*, 455 U.S. 992 (1982); *Chavis* v. *Rowe*, 643 F.2d 1281, 1287 (7th Cir. 1981) *cert. denied*, 454 U.S. 907 (1981); *Aikens* v. *Lash*, 514 F.2d 55, 60 (7th Cir. 1975), *vacated and remanded on other grounds*, 425 U.S. 947 (1976), *reinstated as modified*, 547 F.2d 372 (7th Cir. 1976); *Wilwording* v. *Swenson*, 502 F.2d 844, 851 (8th Cir. 1974), *cert. denied*, 420 U.S. 912 (1975); *Finney* v. *Mabry*, 455 F.Supp. 756, 770 (E.D. Ark. 1978); *United States ex rel. Speller* v. *Lane*, 509 F.Supp. 796, 800 (S.D. Ill. 1981); *Kritsky* v. *McGinnis*, 313 F.Supp. 1247, 1250 (N.D.N.Y. 1970), *aff'd sub nom.*, *Rodriguez* v. *McGinnis*, 456 F.2d 79 (2nd Cir. 1972), *rev'd on other grounds sub nom.*, *Presier* v. *Rodriguez*, 411 U.S. 475 (1973) (citing *Nolan* v. *Scafati*, 306 F.Supp. 1, 3 (D. Mass. 1969)

vacated on other grounds 430 F.2d 548 (1st Cir. 1970)); *Washington* v. *State*, 405 So.2d 62, 64 (Ala. Crim. Ct. App. 1981); *State ex rel. Meeks* v. *Gagnon*, 95 Wis. 2d 115 (Ct. App. 1980); see also *Bryant* v. *Department of Public Safety and Correctional Services*, 33 Md. App. 357 (1976).

It should also be noted that in reviews of other administrative decisions the arbitrary and capricious standard has included examining the factual support for the questioned decision. *Consolidation Coal Company* v. *Gooding*, 703 F.2d 230, 233 (6th Cir. 1983); *Mizerak* v. *Adams*, 682 F.2d 374, 367-377 (2d Cir. 1982); *Recording Industry Association* v. *Copyright Royalty Tribunal*, 662 F.2d 1, 7-8 (D.C. Cir. 1981); see also *Motor Vehicle Manufacturers Association of the United States* v. *State Farm Mutual Automobile Insurance Company*, 463 U.S. 29 (1983).

This Court itself has noted that when a government decision results in forfeiture of an important liberty interest, due process is violated if the decision is not supported by any evidence. See *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 239 (1957); *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 106 (1927); *Tisi* v. *Todd*, 264 U.S. 131, 133-134 (1924); *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922).

A prison disciplinary hearing which leads to the deprivation of good time is particularly the type of administration decision which cannot be arbitrary or capricious and which must be supported by some evidence.

The liberty interest in good time credits is established statutorily by the right to receive such credits. Mass. Gen. Laws Ch. 127, § 129 *et seq.* The Department of Correction's regulations establish that the loss of good time is a major sanction and can only be recommended in

instances where the offense charged has been deemed a major one. 103 Code of Mass. Reg. 430.08-11, 430.23. The disciplinary board in fact only recommends the forfeiture of good time, as the loss is considered serious enough to require the approval of the commissioner. Mass. Gen. Laws Ch. 127, § 129. (The hearing and determination of the board, however, is the crucial factor in the loss of the good time as there must be a recommendation of the board based on a finding of guilt before the forfeiture can be approved.) "The deprivation of good time is unquestionably a matter of considerable importance. The State reserves it as a sanction for serious misconduct, and we should not unrealistically discount its significance." *Wolff* v. *McDonnell*, 418 U.S. 539, 561 (1974). The fact that *Wolff* did not find it as grevious a loss or of the same stature as a parole or probation revocation or a criminal trial does not diminish the importance of the interest or the seriousness of the loss as compared to other possible sanctions. Although it does not immediately work a change in the conditions of liberty, it does make a change in the sentence of the inmate at the time of the forfeiture. His or her sentence had been reduced at that point through the earned good time and is now increased. The number of days that can be lost is limited only by the number of days earned by the inmate at the time of the hearing. *In re Patten*, 5 Mass. App. 897 (1977). A person can lose hundreds of days of good time credits resulting in an additional incarceration of several years. *Lamoureux* v. *Superintendent, Massachusetts Correctional Institution, Walpole*, 390 Mass. 409 (1983) (Board imposed a forfeiture of 700 days of good time credit).

On the other hand, the burden on the state of a judicial review for sufficient evidence is relatively slight. The Department of Correction's regulations already provide

for a formal hearing in major matters. This procedure differs from the informal procedure for minor offenses. 103 Code of Mass. Reg. 430.08-10. The Respondents only ask that the Department live up to its own regulations, something it is constitutionally required to do. See section II, c. *infra*. The needed record is no more than what *Wolff* already requires. It asks no more than what is required for the administrative appeals that are already provided for by regulation and statute. It is hard to imagine how the Commissioner of Correction could make the review required of him on records that are said to be inadequate for a court to review for sufficiency of evidence to support the decision.

The Petitioner's assertion that review is precluded because informant information may, under *Wolff*, be excluded from the disciplinary board's statement of the evidence is also illusory. A record of such information may easily be preserved for future review without giving the inmate access to it.

The Defendant also argues that there would be a cost to the Department and to the courts in increased litigation. Again, this would not be great as review for sufficient evidence would not require *de novo* hearings but rather reviews properly limited and similar to those of other administrative actions. This is a small cost to pay to protect a person's right not to be denied due process and not to arbitrarily lose hard-earned good time credits. It is well settled that constitutional protections cannot be denied for budgetary reasons. *Blaney* v. *Commissioner of Correction*, 374 Mass. 337 (1978). *Ruiz* v. *Estelle*, 503 F.Supp. 1265 (S.D. Tex. 1980); *Rutherford* v. *Pitchess*, 457 F.Supp. 104 (C.D. Cal. 1978). In fact, the Massachusetts trial courts have already taken steps to expeditously process prisoner cases and to ease the administrative

burden of having to transport prisoners and others to court by holding periodic sessions at M.C.I. Walpole, the state's only maximum security prison (which is located adjacent to both a large medium security prison and a minimum security facility). 11 Massachusetts Lawyers Weekly 353, 376 (Dec. 13, 1982).

The Petitioner also presumes to argue that, as the budgetary restrictions might affect the day to day life of the inmates, it would be better for them not to have such a substantive due process review. Pet's Br. 20. This ignores the great desire on the part of inmates not to lose hard-earned good time credits, particularly for no reason or with no basis in evidence. The Petitioner then goes on to express concern that litigation promotes an adversarial atmosphere within a prison and exacerbates a we-they relationship between inmates and prison officials. Pet's Br. 20 n.8. It is hard to see how allowing prison officials to act arbitrarily and to impose the loss of good time credits for no reason or with no basis in evidence will promote good-will in our prison system.

Nor would judicial review for sufficient evidence undercut the legitimate correctional goal of sure and swift discipline for misconduct. Pet's Br. 16. As the Supreme Judicial Court pointed out, the "forfeiture of good time credits does not ordinarily result in swift punishment because its impact is not felt by the inmate until, but for the forfeiture, his period of incarceration would be at an end." Cert. Pet. App. A. 14. As the forfeiture of good time does not result in a swift punishment, judicial review could not hinder such a goal. Of course, unwarranted punishment is not a legitimate correctional goal. Finally, as the goal of the good time credits themselves is to create incentives for obeying rules and good conduct, a halt to arbitrary forfeitures would likely enhance prison security

and operations. It is hard to expect a person to strive for credits that might be taken from him or her arbitrarily. Good conduct is not encouraged when a disciplinary system is a charade.

Nor would such a review place the courts in the position of second guessing the conclusions of administrators who have a better grasp of their domain. The Respondents do not seek a review of the validity of rules or credibility of evidence but a review as to whether the facts found constitute sufficient evidence for the board's conclusion that a rule has been violated. This is a function that is reserved in many cases for our courts. It is in fact an important task of our courts in criminal matters. It is surely not contended that the FCC, the Department of Health and Human Services, the Massachusetts Commissioner of Insurance or any number of agencies or public persons are not expert in their own domains. Yet their actions are reviewed by the courts. Such review is a task that our society allocates to our judges.

B. In *Wolff* v. *McDonnell* The Supreme Court Recognized The Requirement Of Sufficient Evidence Before There Can Be A Deprivation Of A Liberty Interest.

The Supreme Judicial Court found that the requirement for sufficient evidence logically follows from this Court's holding in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974). Although *Wolff* sets forth a comprehensive list of the procedural requisites that must be provided in prison disciplinary hearings, it does not review, discuss, mention or in any way refer to a limitation of the further due process right not to be found guilty except by the appropriate quantum of evidence. *Wolff* was brought to inquire into and redress faults in the procedural aspects of the Nebraska disciplinary hearings. Although this Court did

not go beyond the issues presented in *Wolff* and make rulings on substantive review in any individual case;

> such an entitlement logically follows from the court's holding with respect to the requirements of procedural due process, together with its reasoning that 'a written record helps to insure that administrators, faced with possible scrutiny by state officials and the public, *and perhaps even the courts*, where fundamental constitutional rights may have been abridged, will act fairly' (emphasis added). *Wolff* v. *McDonnell*, *supra* at 565.

Hill, Cert. Pet. App. A 10. This Court has specifically held "there must be a 'written statement by the factfinders as to the evidence relied on and reasons' for the disciplinary action." *Wolff*, 418 U.S. at 564. This was required even though the Nebraska system did not have a system of administrative appeals. Such a written statement and acknowledgement that the courts might be involved is a clear indication that courts would be examining the statement for sufficiency of evidence. It begs the question to argue that only procedural rights are required and that once they are given there can be no abridgement of constitutional rights. It also misconstrues what this Court requires to be reported in such a written statement. This Court did not state that there must be a written report by the factfinders as to the procedures followed at the hearing. This Court did not state that there must be a written report as to when and how the inmate received notice of the hearing or the factors that show the hearing was an impartial one. The requirement is that the written statement must show the evidence relied upon and the reasons for the action. A review would be directed to that evidence and those reasons. As stated in *Aikens* v. *Lash*, 514 F.2d 55, 60 (7th Cir. 1975), *vacated and remanded on other grounds*, 425 U.S. 947

(1976), *reinstated as modified*, 547 F.2d 372 (7th Cir. 1976):

> As a practical matter, we fail to see the conflict defendants note between the term "substantial evidence" and the phrase "evidence relied on and reasons for the disciplinary action." Presumably, the Supreme Court did not contemplate in *Wolff*, where its use of the latter phrase in connection with the array of procedural rights provided was directed at protecting prisoners from subsequent collateral consequences, that these rights should be easily emasculated by allowing prison officials to infringe arbitrarily on an inmate's substantive due process right not to be found guilty except by an appropriate quantum of evidence. *See e.g.*, *Gomes* v. *Travisono*, 510 F.2d 537, 549 (1st Cir. 1974); *Wilwording* v. *Swenson*, 502 F.2d 844, 851 (8th Cir. 1974).

Preventing arbitrary determinations is the "touchstone of due process" *Wolff*, 418 U.S. at 558, and the main thrust of this Court's decision in *Wolff*. *Wolff* intends a genuine hearing and not a charade. *Kyle* v. *Hanberry*, 677 F.2d 1386 (11th Cir. 1982). If a board can find people guilty with insufficient evidence, disciplinary hearings are that charade.

The Solicitor General expresses a concern that this reading of *Wolff* would widen the application of review for sufficient evidence to a wide variety of cases in which government action infringes upon property interests. Solicitor General's Br. 12. This concern is misplaced because in the instant case the only issue presented to the Court is the requirement for due process where a liberty interest is involved. What is involved is not a property interest but the interest in being free from incarceration. This Court has never held that incarceration can occur without the right to judicial review for a due process violation of insufficient evidence. Cf. *United States ex rel.*

Vajtauer v. *Commissioner of Immigration*, 273 U.S. 103, 106 (1927). (Deportation without a fair hearing or on charges unsupported by any evidence is a denial of due process which may be corrected on *habeas corpus*.)

C. This Is Not An Appropriate Case In Which To Decide The Level Of Evidence Needed To Support A Disciplinary Board's Findings As The Massachusetts Supreme Judicial Court Did Not Rule On This Question.

There is some difference among the courts as to the standard of evidence needed to support a disciplinary board's findings. Some decisions, notably *Chavis* v. *Rowe*, 643 F.2d at 1287; *Franklin* v. *Israel*, 537 F. Supp. 1112, 1117 n.3 (W.D. Wis. 1982); *Calloway* v. *Fauver*, 544 F. Supp. 584, 605 (D.N.J. 1982); *Nolan* v. *Scafati*, 306 F. Supp. at 3; and *Washington* v. *State*, 405 So. 2d at 64, state that the determination must be reviewed for substantial evidence. Other decisions, notably *Smith* v. *Rabalais*, 659 F.2d at 545; *Inglese* v. *Warden*, 687 F.2d 362, 363 (11th Cir. 1982); and *Finney* v. *Mabry*, 455 F. Supp. at 770, indicate that the court should consider whether the decision is supported by some facts or any evidence at all. In the instant case, however, the Massachusetts Supreme Judicial Court chose not to rule upon whether the "substantial evidence" or the more lenient "some evidence" rule was the more appropriate one. The Supreme Judicial Court concluded that the Board's findings failed to meet even the more lenient "some evidence" test. *Hill*, Cert. Pet. App. A 17, ftn. 5. As the issue of the standard of review was not decided by the Supreme Judicial Court, this case would be an inappropriate vehicle for this Court to use to resolve these conflicts.

The Petitioner also misreads the Court below in postulating that the Supreme Judicial Court has come up with a different standard than the "some evidence" of

Smith v. *Rabalais*, 659 F.2d at 545. The Petitioner argues that by stating that it was reviewing the "legal sufficiency" of the evidence to support the disciplinary board's findings, the Supreme Judicial Court went beyond the standard of "any" evidence to support the board's findings. Pet.'s Br. 11. The Petitioner seems to confuse the reason for review, to find the sufficiency of the evidence, with the standard to be used in determining that sufficiency. The Petitioner also seems to be arguing that the "any evidence" standard means any evidence that might be relevant no matter how tenuous. Under such an interpretation of the "any evidence" standard, an inmate who was present in an institution on the day of a fight might be convicted even if the only evidence presented was his presence in the institution on the day in question. His presence at the institution on the day of the fight is certainly a relevant factor, but is far distant from evidence of guilt. Another example might be an inmate convicted of helping another to violate a regulation based only on the evidence that they knew each other. Again, the fact that they knew each other is relevant but only tenuously related to guilt. An "any evidence" standard would be a charade unless there were some test of the legal sufficiency of that evidence linking it to guilt. A reading of the cases that adopt the "any evidence" standard shows that the legal sufficiency of the evidence must be considered. In *Finney* v. *Mabry*, 455 F. Supp. at 770, the Court specifically states that at some point what is labeled "evidence" cannot serve as a basis for fair fact finding. *Finney, Id.* The Court also refers to "proper evidence." *Finney, Id. Wilwording* indicates it would be "a violation of due process to convict and punish a man without *evidence of his guilt.*" *Wilwording* v. *Swenson*, 502 F.2d at 851 (emphasis added). These cases are indications that the "any evidence" standard of *Smith* v. *Raba-*

lais is the standard used by the Massachusetts Supreme Judicial Court.

Although the issue of "substantial" versus "some" evidence is not before this Court, it is important to note that the Department of Correction's regulations mandate that all disciplinary board decisions be made by a preponderance of the evidence. Code of Mass. Regs. 430.16. These regulations guarantee a decision based on substantial evidence. Violations of state-promulgated regulations violate a person's right to due process. *Kenney* v. *Commissioner of Correction*, 393 Mass. 28 (1984); *Toussaint* v. *Rushen*, 553 F. Supp. 1365 (N.D. Cal. 1983); *McKinnon* v. *Patterson*, 425 F.Supp. 383, 393 (S.D.N.Y. 1976). *See also, e.g., Four Unnamed Plaintiffs* v. *Hall*, 424 F. Supp. 357 (D.Mass. 1976); *Walker* v. *Hughes*, 558 F.2d. 1247 (6th Cir. 1977), *Adargo* v. *Barr*, 482 F. Supp. 283 (D.Colo. 1980); *Duckett* v. *Ward*, 458 F. Supp. 624 (S.D.N.Y. 1978); *Bono* v. *Saxbe*, 450 F. Supp. 934 (E.D.Ill. 1978). An individual within the Department of Correction can not arbitrarily disregard agency regulations and Massachusetts courts have acted to enforce the agency's regulations. *Kenney*, 398 Mass. 28. Thus, the decisions of the disciplinary board in this case could have been reviewed to determine if they were based on a preponderance of the evidence. This is, of course, much closer to the "substantial evidence test." However, the *pro se* complaint filed in the Superior Court did not raise the issue of the need for a finding based on the preponderance of the evidence under the regulations.

This Court itself used a substantial evidence test in *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 247 (1957) which is more extensively discussed in Section IV of this brief. In that case, Schware had been denied admission to the New Mexico Bar on the basis of not being

of good moral character. The Court ruled that after reviewing the entire record the evidence on which the state relied would have to raise substantial doubts before it could be considered sufficient to support the denial of admission to the Bar. *Schware*, 353 U.S. at 247.

III. THE COURT BELOW WAS CORRECT IN HOLDING THAT THE BOARD DID NOT RECEIVE SUFFICIENT EVIDENCE TO SUPPORT A FINDING OF GUILT AND A DEPRIVATION OF GOOD TIME CREDITS.

Under any standard of review, substantial, preponderant or some evidence, the Supreme Judicial Court and the trial court were both correct in finding that there was insufficient evidence to support the disciplinary board's finding of guilt. Cert. Pet. App. A 16-19, B 8. The total sum of the evidence presented was that after hearing a commotion and seeing an inmate who appeared to have been assaulted, a guard observed three inmates jogging away. The only possible evidence that could have been relied on was that three inmates were seen jogging away from a spot where it appeared that an assault had taken place. The Petitioner seems to be citing the presence of three inmates, "jogging," and statements by two of the inmates that they did not know what had occured as being circumstantial evidence of participation in the assault by those two inmates. A finding of guilt cannot based on such a paucity of facts.

The Supreme Judicial Court has recently indicated that there are inherent dangers in drawing any inference of guilt from flight, *Commonwealth* v. *Toney*, 385 Mass. 575, 583-585, n.6 (1982) and pointed to the equivocal nature of evidence of flight. *Commonwealth* v. *Amado*, 387 Mass. 179 (1982). This is especially true in the instant case in light of the prison setting and the fact that there

were three persons involved in the "flight." Even presuming that one person did commit an assault, the leaving of three persons cannot be said to be evidence that all three participated in the assault. Any prisoner who sees a person who looks like they may have been assaulted, even when he or she has nothing to do with the act, is going to leave so he or she is not found at the place and accused of committing the act. To rely on flight as evidence of consciousness of guilt in this situation leaves an inmate in a peculiar situation. Either he or she remains at the scene of a possible assault and risks being found guilty on the basis of his or her proximity or he or she leaves and is found guilty because the flight is evidence of consciousness of guilt. This dilemma makes it clear why, especially when more than one person is involved, "flight" cannot be considered evidence of guilt.

Nor is it fair to rely on the Respondents' statements that they did not know what happened as evidence of consciousness of guilt. Pet's Br. 21 n.9. They do not deny that something happened, merely that they did not know or see what happened. The sole witness did not see either of the Respondents either before or during the supposed incident and there is no evidence of where the Respondents were actually located during the supposed assault. J.A. 17a-18a, 27a-28a. His report is not evidence that the Respondents must have known what happened but were denying that they knew what happened. Nor is this case similar to *Baxter* v. *Palmigiano*, 425 U.S. 308, 318-320 (1976). There the inmate in question refused to testify at all. An adverse inference could be drawn from that refusal. The Respondents in the instant case did testify. J.A. 19a, 27a. Again, to rely on denial of knowledge in this case as evidence leaves an inmate in a peculiar situation. He can refuse to testify and be found guilty, he can state he

does not know what happened and be found guilty, he can make something up which is not believed and be found guilty or he can confess to something that he did not do and be found guilty.

The instant matter is similar to the situation in *Boyd* v. *Oregon State Penn., Corrections Division*, 29 Or. App. 71 (1977). There the court held that where the record was barren of evidence of where contraband was found in a two-man cell the evidence was insufficient to support a charge of possession of contraband. It is clear that the court felt that where more than one person is implicated in an incident there must be some evidence pointing to a particular inmate before he will be found guilty of what another inmate might have done.

It should also be pointed out that the written statement of evidence cites only the Respondents' presence in the area as support for the finding of guilt. J.A. 19a, 27a. Apparently the board did not rely on the "flight." Although the "jogging away" was mentioned in the reporting officers' report and testimony, the Board only states that this testimony was considered, not that it found it to be true or that the "jogging away" was a fact relied upon for the decision.

It cannot be said that there was "some" evidence to support the Board's finding. "[A]t some point what is labeled 'evidence' cannot serve as a basis for fair factfinding . . ." *Finney* v. *Mabry*, 455 F. Supp. at 770. The consideration of what is evidence which can serve as a basis for fair factfinding is essential to prevent disciplinary hearings from becoming charades that cover a denial of due process.

IV. THE UNITED STATES CONSTITUTION GUARANTEES A RIGHT TO JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS.

As argued above, the question of whether there is a constitutional right to judicial review of an administrative decision which deprives a person of his or her liberty is not before the Court in the instant case. However, as the issue has been raised by the Petitioner's suggestion that no such right exists, the Respondents feel it appropriate to examine the Court's prior treatment of this question.

The constitutional right to judicial review of administrative decisions which work a deprivation of liberty for the purpose of determining whether the decision is supported by evidence has been recognized at least since *Ng Fung Ho* v. *White*, 259 U.S. 276 (1922). In that case, concerning judicial review of an administrative decision to deport a United States resident who claimed to be a citizen, this Court held that "[a]gainst the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law." 259 U.S. at 284-285. Considering the scope of judicial review of administrative decisions a decade later, Justice Brandeis said, "[a] citizen who claims that his liberty is being infringed is entitled, upon *habeas corpus*, to the opportunity of judicial determination of the facts." *St. Joseph Stockyards Co.* v. *United States*, 298 U.S. 38, 77 (1936) (Brandeis, J., concurring). See *Rusk* v. *Cort*, 369 U.S. 367, 380-382 (1962) (Brennan, J., concurring); *Johnson* v. *Robison*, 415 U.S. 361, 366-367 (1974) (statute construed to permit judicial review.)

Even in cases involving property rather than liberty interests, this Court has upheld the right to judicial review of administrative determinations. The setting of

rates charged by a stockyard, for example, was found to be subject to judicial review, despite an effort by the legislature to preclude review of the administrative agency's factual findings.

> When the legislature appoints an agent to act . . . it may endow the agent with power to make findings of fact which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily [citations omitted]. . . . In such cases, the judicial inquiry into facts goes no further than to ascertain whether there is evidence to support the findings. . . .
>
> Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that their findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and to impair the security inherent in our judicial safeguards."

St. Joseph Stockyards Co. v. *United States*, 298 U.S. 38, 51-52 (1936).

See *Weinberger* v. *Salfi*, 422 U.S. 749, 763 (1975).

Nothing referred to by the petitioner is to the contrary. The lack of a constitutional right to appellate review of a judicial decision says nothing about the right to an initial judicial decision. "The difference in security of judicial over administrative action has been adverted to by this court." *Ng Fung Ho* v. *White*, 259 U.S. at 285. *Reetz* v. *Michigan*, 188 U.S. 507 (1903), is cited by petitioner for

the proposition that "administrative agencies may make final determinations of legal questions, which are not subject to judicial oversight." (Pet's Br. 7). However, this Court explicitly noted in *Reetz* that "it is not true that such proceedings are beyond investigation of the courts." 188 U.S. at 509. In *Dreyer* v. *Illinois*, 187 U.S. 71 (1902) not only was no liberty interest at stake, but this Court did not even consider the question of judicial review.

The petitioner also heavily relies on *Ortwein* v. *Schwab*, 410 U.S. 656 (1973), where welfare recipients, seeking judicial review under state law of agency decisions reducing their benefits, were required to pay a filing fee. The recipients then petitioned the Supreme Court of Oregon to order that the cases be accepted without the payment of filing fees. The Supreme Court of Oregon declined to do so, and from that denial the appeal to this Court was taken. The decision in *Ortwein* does not state that the Oregon courts could not review the Public Welfare Division decisions nor did it state that the Oregon courts could not review those decisions for sufficiency of evidence. It merely stated that because there was no fundamental interest gained or lost depending on the availability of the relief sought, this Court would not mandate that the filing fees be waived. *Id.*, at 659. This Court also specifically distinguished the situation in *Ortwein* where the question was a reduction in benefits, from that of *Broddie* v. *Connecticut*, 401 U.S. 371 (1971) where the question involved was access to the courts in a marital situation. *Id.* Certainly the increased incarceration of a person is a fundamental liberty interest that is much closer to the interests at stake in *Broddie* than to the interest at issue in *Ortwein*.

The Petitioner also cites *Tisi* v. *Todd*, 264 U.S. 131 (1924). *Tisi*, however, only states that a court will not

review the evidence introduced at a deportation hearing to see if it would be legally sufficient to prove a fact in a court of law. The Court, however, did actually review the evidence introduced in the deportation hearing and found that there was evidence which reasonably supported the essential findings in the case. *Id.*, at 133.

Two other cases cited by the Petitioner not only do not support his position but in fact support the Respondents. In *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 106 (1927) this Court held that "[d]eportation without a fair hearing or *on charges unsupported by the evidence* is a denial of due process which may be corrected on *habeas corpus*." *Id.*, at 106 (emphasis added). The standard used was that of some or any evidence. *Id.* (It should be noted that this review was not under an Administrative Procedure Act but that the vehicle for obtaining judicial review was a writ of *habeas corpus*). In *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 239 (1957) this Court went even further in reviewing an administrative decision for the sufficiency of evidence. Schware had been denied admission to the New Mexico Bar on the basis of not being of good moral character. This Court held that "[e]ven in applying permissible standards, officers of a state cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards . . ." *Id.* at 239. "Therefore the question is whether the Supreme Court of New Mexico on the record before us could reasonably find that he had not shown good moral character." *Id.* This Court then examined the facts on which New Mexico had relied and found them insufficient. *Id.*, at 243. This Court went on to examine the evidence presented by Schware and stated that:

> In light of petitioner's forceful showing of good moral character the evidence upon which the state relies—

> the arrests for offenses for which the petitioner was neither tried or convicted, the use of an assumed name many years ago and membership in the Communist Party during the 1930's—cannot be said to raise *substantial doubts* about his present good moral character."

Id., at 247 (emphasis added). Not only did this court review the administrative decision concerning admission to the bar for the sufficiency of evidence, it required not only that there be some or any evidence to support that decision but also that the evidence be substantial.

The only case that the Petitioner has pointed to in which a court has refused to review the sufficiency of evidence in a prison disciplinary hearing is *Russell* v. *Division of Corrections, Commonwealth of Virginia*, 392 F. Supp. 476 (W.D. Va. 1975), *aff'd without opinion*, 530 F.2d 969 (4th Cir. 1975). The District Court in *Russell* stated that the sufficiency of the evidence in a disciplinary matter was beyond its inquiry and cited *Grundler* v. *North Carolina*, 283 F.2d 798 (4th Cir. 1960). *Grundler*, however, provides no support for this contention. In that case a *habeas corpus* petition was filed in federal court requesting a review of a state criminal trial. The Fourth Circuit ruled that it could not intervene by *habeas corpus*, when the errors were of a character which could not reasonably be said to involve a deprivation of constitutional rights.

> Normally, the admissibility of evidence, the sufficiency of evidence, and instructions to the jury in state trials are matters of state law and procedure not involving federal constitutional issues. It is only in circumstances impugning fundamental fairness or infringing specific constitutional protections that a federal question is presented.

Grundler, at 802. As all parties agree that an arbitrary or capricious deprivation of a liberty interest would be a

violation of the due process protections, an allegation that there is no evidence supporting such a deprivation would be precisely the type of situation for which the *Grundler* court reserves the *habeas corpus* petition.

The Petitioner also relies on several military decisions, including *Hiatt* v. *Brown*, 399 U.S. 103 (1950) and *Whelchel* v. *McDonald*, 340 U.S. 122 (1950). These cases do not have a bearing on the instant matter. *Hiatt* and *Whelchel* involve the review of court-martial hearings. The instant case is not analogous to these military cases as the Framers of the Constitution specifically entrusted to Congress the authority and right to determine the rules for the government and regulation of the military. This Constitutional mandate sets the military apart from the civilian courts.

It should also be noted that in military cases there is an extensive formal judicial hierarchy set up with a complete appellate system and provisions for ultimate review by a civilian court. *Burns* v. *Wilson*, 346 U.S. 137, 141, ftn. 7 (1953). This serves the function of the "independent review" referred to by the Supreme Judicial Court, Cert. Pet. App. A 11-12, that is not available in a system of administrative appeals that all take place within the Department of Correction.

In light of the above-cited cases, if this Court were to hold that there is no constitutional right to judicial review of constitutional defects in administrative proceedings which lead to a deprivation of liberty it would be reversing decades of established principle and stepping, totally without need, into a "constitutional quicksand." *Rusk* v. *Cort*, 393 U.S. at 382 (Brennan, J. concurring).

V. CONCLUSION

For the foregoing reasons, the Respondents respectfully request that the judgment of the Massachusetts Supreme Judicial Court be affirmed.

Respectfully submitted,

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APPENDIX

MASS. GEN. LAWS c. 127

§ 129. Record of conduct; reduction of term; determination; certificate of discharge; parole; forfeiture of deductions

The officer in charge of each correctional institution or other place of confinement, except a defective delinquent department, shall keep a record of each prisoner in his custody whose term of imprisonment is four months or more. Every such prisoner whose record of conduct shows that he has faithfully observed all the rules of his place of confinement, and has not been subjected to punishment, shall be entitled to have the term of his imprisonment reduced by a deduction from the maximum term for which he may be held under his sentence or sentences, which shall be determined as follows: Upon a sentence of not less than four months and less than one year, two and one half days for each month; upon a sentence of not less than one year and less than two years, five days for each month; upon a sentence of not less than two years and less than three years, seven and one half days for each month; upon a sentence of not less than three years and less than four years, ten days for each month; upon a sentence of four years or more, twelve and one half days for each month; provided, however, that no prisoner serving a sentence imposed for a violation of section thirteen B, twenty-two, twenty-two A, twenty-three, twenty-four or twenty-four B of chapter two hundred and sixty-five or section seventeen, thirty-five or thirty-five A of chapter two hundred and seventy-two, or for an attempt to commit any crime referred to in said sections shall be entitled to have the term of his imprisonment under such sentence reduced under the provisions of this section. If a prisoner has two or more sentences to be served concurrently or otherwise, the maximum period of time for which he may be held under his sentences shall be the basis upon which the deduction shall be determined; except that when a prisoner on parole is sentenced for a new crime, the sentence on which he was paroled shall be considered separately, and shall not be aggregated with any

new sentence for the purposes of determining the deductions. If a prisoner violates any rule of his place of confinement, the commissioner of correction, the county commissioners, and, in Suffolk county, the penal institutions commissioner of Boston, upon the recommendation and evidence submitted to them respectively, in writing by the principal officer, or officer in charge, shall decide what part, if any, of such good conduct deduction from sentence or sentences shall be forfeited by such violation, and may likewise determine, in the event of the prisoner's subsequent good conduct, whether any or all of such deduction shall be restored.

A prisoner in a correctional institution of the commonwealth who is entitled to have the term of his imprisonment reduced shall receive from the commissioner of correction a certificate of discharge and shall be released from the correctional institution in which he has been confined, upon the date which has been determined by such deductions from the maximum term of his sentence or sentences. A prisoner in a county penal institution who is entitled to have the term of his imprisonment reduced shall receive from the county commissioners or, in Suffolk county, the penal institutions commissioner of Boston, a certificate of discharge, and shall be released from the institution in which he has been confined, upon the date which has been determined by such deductions from the maximum term of his sentence or sentences. A prisoner released on parole by the parole board, who has faithfully observed all the rules of his parole and has not been returned to prison or a county penal institution for the violation of his parole, shall be entitled to have the term of his imprisonment reduced by a deduction from the maximum term for which he may be held under the sentence or sentences, but only for that period of the sentence or sentences during which he was actually confined, and in such case, the parole board shall issue to him a certificate of final discharge and release from further supervision upon the date which has been determined by such a deduction from the maximum term of his sentence or sentences. Any other prisoner released on parole from a county penal institution who

is entitled to have the term of his imprisonment so reduced shall receive from the county commissioners, or in Suffolk county the penal institutions commissioner of Boston, a certificate of final discharge.

If, during the term of imprisonment of a prisoner confined in a correctional institution of the commonwealth, such prisoner shall commit any offense of which he shall be convicted and sentenced, he shall not be entitled to any deductions hereunder from the new sentence or sentences of imprisonment. A prisoner released on parole by the parole board, who has failed to observe all the rules of his parole and has been returned to a correctional institution for the violation of his parole, shall not receive deductions described in this section until he has served six months following his return to the correctional institution.

MASS. GEN. LAWS c. 249

§ 4. Petition; notice; hearing; determination; limitations; costs; mandamus. A petition for a writ of certiorari to correct errors in proceedings which are not according to the course of the common law may be presented to a justice of the supreme judicial court, and he may, after notice, hear and determine the same. It shall be open to the petitioner to contend at the hearing upon the petition that the evidence which formed the basis of the action complained of or the basis of any specified finding or conclusion was as matter of law insufficient to warrant such action, finding or conclusion. The writ shall not be issued unless the petition therefor is presented within two years next after the proceedings complained of. It may be issued from the clerk's office in any county and shall be returnable as the court orders. The court at any time after the petition is presented may impose costs upon any party, may issue an injunction and may order the proceedings brought up; and, after they are brought up, may quash or affirm them, or may make such order, judgment or decree as law and justice may require. The powers conferred by the foregoing sentence shall apply also to a petition for a writ of mandamus and to an amended petition for either a writ of certiorari or a writ of mandamus under section one C of chapter two hundred and thirteen, subject in case of appellate proceedings, to the authority of the supreme judicial court to suspend the operation of any judgment or decree and to amend any order pending such appellate proceedings as is provided in equity by section twenty-two of chapter two hundred and fourteen. As amended St.1943, c. 374, § 1; St.1953, c. 586, § 1.

430.08: Detection and Reporting of Disciplinary Offenses

(1) Informal handling of very minor offenses in accordance with existing practices is not precluded or discouraged by these regulations. Where an employee reasonably believes that formal disciplinary action is not necessary he or his supervisor may issue a warning and handle the matter informally as an alternative to formal disciplinary action.

(2) Where informal handling is not appropriate an employee who has reason to believe that a disciplinary offense has been committed by an inmate shall write a disciplinary report and file it with the shift commander or other person designated by the superintendent before the completion of his tour of duty.

(3) Within one (1) weekday the shift commander or other person designated by the superintendant shall review the disciplinary report and either:

(a) Forward it to the disciplinary officer for disciplinary action,

(b) Handle the matter informally in accordance with the provisions of 103 CMR 430.08(1),

(c) Dismiss the disciplinary report.

If he decides to forward the disciplinary report to the disciplinary officer for disciplinary action he may revise or supplement it.

430.09: Preliminary Responsibilities of the Disciplinary Officer

(1) Within two (2) weekdays after receipt of the disciplinary report, the disciplinary officer shall review the disciplinary report, make whatever investigation he deems necessary and either:

(a) Dismiss the disciplinary report.

(b) With the approval of the superintendent take no immediate action on it pending the receipt of further information, or

(c) Proceed with formal disciplinary action.

(2) If the disciplinary officer decides to proceed with formal disciplinary action he shall within the aforesaid two (2) weekdays designate the offense charged as a minor or major matter and he may revise or supplement the disciplinary report. If the charge against the inmate includes the alleged commission of a felony, the disciplinary officer shall immediately notify the superintendent so that he may refer the case to the district attorney for possible prosecution. Any case referred to the district attorney shall be handled as a major matter.

(3) In designating the offense as a minor or major matter the disciplinary officer shall consider the following factors:

(a) Threat to institution security

(b) Repetitiveness

(c) Extent of harm done

(d) Mitigating circumstances

Cases involving little or no threat to the well being of others, to property, or to the security of the institution shall ordinarily be designated as minor matters.

430.10: Proceedings in Minor Matters

(1) After designation of an offense as a minor matter, the disciplinary report shall be served upon the inmate by the disciplinary officer of his designee within one (1) weekday. The disciplinary officer shall then interview the inmate, review the evidence and make a finding of guilty or not guilty within two (2) weekdays after service of the report. Upon a finding of guilty, he shall also impose a sanction or sanctions from the list of minor sanctions at 103 CMR 430.23(1).

(2) The disciplinary officer or his designee shall notify the inmate in writing of the finding and sanction, if any, within one weekday, and, upon a finding of guilty, he shall advise the inmate of his right to appeal to a disciplinary board and shall give the inmate an appropriate appeal form.

(3) An inmate may appeal the findings and/or sanctions of the disciplinary officer on a minor matter to the disciplinary board within two (2) weekdays of the receipt of

the finding. The appeal hearing before the disciplinary board shall be conducted in accordance with the procedures governing hearings before the disciplinary board on major matters except the provisions of 103 CMR 430.12(1) and 430.12(3).

(4) The disciplinary board hearing an appeal on a minor matter may sustain the finding and sanction of the disciplinary officer, reduce or suspend the sanction, or reverse the decision and dismiss the charge.

430.11: Notice and Scheduling of Hearing Before Disciplinary Board

(1) After the designation of the offense as a major matter, the disciplinary report, a notice of the hearing, and a request for representation and/or witness form shall be served upon the inmate by the disciplinary officer or his designee within one weekday.

(2) If an inmate wishes to be represented in accordance with the provisions of 103 CMR 430.12(1) and/or to have the reporting officer or other witnesses present in accordance with the provisions of 103 CMR 430.14(4) and 430.14(6), he shall complete the request for representation and/or witness from and submit it to an officer within twenty-four (24) hours of receiving it. Any officer who receives such form shall complete it and deliver it to the disciplinary officer before the close of his tour of duty.

(3) The disciplinary officer shall schedule a hearing before the disciplinary board within a reasonable time but not less than twenty-four (24) hours after the inmate has been served with both the disciplinary report and the notice specifying the time of hearing. The inmate shall be entitled to one continuance for good cause provided that any request for a continuance must ordinarily be made at least twenty-four (24) hours prior to the scheduled time of the hearing.

430.16: Deliberation and Decision by the Disciplinary Board

(1) After the close of the evidence, the disciplinary board shall meet in executive session to deliberate and determine the guilt or innocence of the inmate. The burden of

proof shall be on the proponent of the disciplinary report and the disciplinary board shall make its findings on the basis of the preponderance of the evidence.

(2) If the inmate is found guilty, the disciplinary board may impose one or more of the sanctions listed in 103 CMR 430.23. The inmate's record shall not be considered by the disciplinary board in determining the guilt or innocence of the inmate but it may be considered by the disciplinary board in deciding the appropriate sanction. The disciplinary board may also in its discretion recall the inmate after reaching a guilty finding but prior to deciding on a sanction to discuss issues related to its decision on a sanction.

430.23: Sanctions

(1) Minor sanctions shall include:

(a) Reprimand.

(b) Loss of privileges for a specified period of time.

(c) Room restrictions.

(d) Restitution.

(e) Extra-work duty for a specified period of time.

(2) Minor sanctions may be suspended for a specified period of time not to exceed 3 months.

(3) Major sanctions shall include:

(a) Isolation for a specified period of time not to exceed 15 days for one offense.

(b) Recommended good time forfeiture.

(c) All minor sanctions.

(4) Major sanctions may be suspended for a specified period of time not to exceed 6 months.